Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1621

MIRA SLOVAK,

Petitioner,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Reply of Petitioner to Memorandum for the Respondent in Opposition

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REPLY OF PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Without waiving his Motion to Strike the Memorandum for the Respondent in Opposition, the Petitioner replies to said memorandum as follows:

1. The primary questions before the Court deal with jurisdiction i.e.: (a) whether the respondent has jurisdiction over local air shows conducted outside the scope of "air commerce" as defined by 49 U.S.C. Sec. 1301(4) and where the State of Nevada has laid sovereign claim to the airspace over its territory (Pet. App. A. 32); (b) whether the Court of Appeals erred in not adjudicating the question which was properly raised (as conceded by the respondent (Mem. 3, footnote 2)); and (c) whether the judgment against the petitioner can stand where the respondent offered no evidence of jurisdiction at the trial.

The question in paragraph 1(a) has never been and ought to be decided by the Court. The argument of respondent that the Federal Aviation Act of 1958, 72 Stat. 731, 798, 49 U.S.C. 1508(a) grants to the government "exclusive national sovereignty in the airspace of the United States . . ." cannot possibly mean that the Federal Government controls all the airspace in the country from the ground up. Petitioner, as an airline captain, concedes that in certain locations (such as the approach areas of runways on major airports and in certain restricted or test areas) that the Federal Government ought to have control from the ground up to a reasonable height. However in the instant case the questionable activity took place at low level (10-25 feet, and perhaps a little higher at other times), at a remote location with no nexus to the jurisdiction of the respondent and where the harboring state had its own sovereignty, laws and police to perform the very same activity as respondent.

Why then is the added arm and expense of respondent required for such a purely local event? The cases cited by the respondent (Northwest Airlines v. Minnesota 322 U.S. 292 and Burbank v. Lockheed, 411 U.S. 624) are easily distinguishable as they deal with "air commerce".

2. The respondent *acknowledges* "that the court of appeals' memorandum erroneously asserts that this jurisdictional issue had not been properly preserved." However, the respondent disposes of the obligation of the court to deal with the question of jurisdiction (once raised) as described in paragraph 1(b) above, by simply stating that the issue was raised in a petition for rehearing and since the Court of Appeals denied the petition, the jurisdictional argument was rejected. (Id. page 3). This is contrary to the law in Cardillo v. Liberty Mutual Ins. Co., 67 S. Ct. 801 at page 804 (1947). Once raised the question of jurisdiction should be resolved as it should have been here.

3. The respondent makes no comment on the issue in paragraph 1(c) above which questions the validity of the judgment against petitioner where no evidence of jurisdiction was offered at the trial.

4. The respondent has, clearly and unjustly made several misstatements of fact in its Memorandum in Opposition which the petitioner is compelled to point out to the Court.

(a) The factual question of *where* the petitioner flew his aircraft *is not contested*. Notwithstanding however, the respondent in its footnote 3 on page 5 of its memorandum has stated that "the Board, . . . pointed out (a) that participants in the *races* could approach no closer than 1,000 feet to the spectators, *whereas petitioner flew a plane within 25 feet of many people*;" . . . (emphasis added).

No such finding was ever made by the Board nor does it appear anywhere in the record!! In another document which is being filed by petitioner concurrently herewith, it will be shown why this misstatement was made by respondent.

(b) In paragraph 2 on page 2 of its Memorandum, the respondent states that the "petitioner flew over a ramp, on which there were several aircraft and 2,500 to 5,000 persons, at an altitude of 10 to 25 feet and a speed in excess of 300 miles per hour (Pet. App. A. 21)."

The statement as phrased does not appear on said page 21 or elsewhere! The statement as phrased would have the Court believe that the petitioner actually flew over the heads or near many people from 10 to 25 feet (as also incorrectly stated in footnote 3 supra) and such was not the case! The closest *estimate* was between 200 and 300 feet. (Tr. 121)

Mr. Duty, the respondent's first witness against the petitioner testified that there was a *pit area* (where the planes were parked as distinguished from the entire ramp which

was 4,500 feet long and 600 feet wide) located on the near side of the ramp near the grandstands. (Tr. 23); that the "*police* estimated" the crowd in the *pit area* to be from 3,000 to 5,000 people (Tr. 24) but that he (Duty) put the figure at from "2,500 to 3,000" (Tr. 40); and that the petitioner *"was not over any person"* and that "he wasn't over *anything* except that *outer section* of the ramp." (Tr. 42). Mr. Adams, the respondent's second witness placed petitioner's flight about 200 feet in from the outer edge of the ramp (Tr. 97) and that the *pit area* was roped off "pretty well" (Tr. 100). This roping was to keep the crowds off the ramp area. In another document which is being filed by the petitioner concurrently herewith, it will be shown why the respondent created this offending phrasing.

5. The petitioner steadfastly maintains that he is being unfairly punished for doing what Mr. Duty, the air race director *and the person to whom the* FAA Waiver was issued, asked him to do i.e.:

> "I asked him (petitioner) if he would take his plane off and fly a couple of circles of the **RAMP** (emphasis added) or course, land, we pull him up in front and then parade him with his sponsor in front of the public as a show opener type of thing, and I felt this would be a good thing for the public." (Tr. 13). ". . . Mr. Duty says the airport is yours." (Tr. 207 by Curella). Despite this uncontradicted evidence the Administrative Law Judge erroneously found that, "Duty had given *no* authorization to the respondent (Slovak) to make the pass over the ramp . . ." (Id. A. 21, lines 19, 20).

Surely Mr. Duty had the color of authority when he made this request. The ramp area and the race course were both less than 2,000 feet from the spectators, and of necessity the flight would have to be below 1,000 feet, both facts well known to Mr. Duty. Without some immunity, the flights, if

carried out, would most certainly be a violation. (Tr. 72 and 73)

The petitioner flew the course on Friday and on Saturday **— both times without objection from the respondent and to the pleasure of the air race director —** "perfect", (Tr. 15) "great show", (Tr. 15) "very well". (Tr. 14 and 16)

Yet when he flew over a portion of the Ramp on Sunday, as he was asked, he was violated on FARs 91.79(a) and (b).

At each level of the proceedings the transcript was "carefully examined" by the Board (Pet. App. A. 13), the record was carefully reexamined again on rehearing (Id. A. 6) and the Court of Appeals made "a thorough examination of the transcript of the agency hearing" . . . (Id. A. 4) but *somehow* the facts that Mr. Duty, who held the Waiver asked a "reluctant" petitioner (also an airline captain) to put on a show — a *"good thing for the public"*, (Tr. 12 and 13) (emphasis added) which he did and as a result he is now faced with having his right to earn a living suspended for 30 days, are circumstances the unfairness of which have not yet attracted the attention of the courts. The petitioner urges in addition to the primary jurisdictional issues, that these are exceptional circumstances worthy of the Supreme Court's consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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